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IN THE

Supreme Court of the United States

G. STEVEN ROWE, ATTORNEY GENERAL OF MAINE,
Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Amicus will address the following question: Whether the standards for preemption under the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") that apply to state restrictions on the delivery of tobacco products necessarily apply in precisely the same way to state restrictions on the delivery of products containing alcohol.

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INTEREST OF *AMICUS CURIAE*[1]

Wine and Spirits Wholesalers of America, Inc. ("WSWA") is a national trade organization and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents nearly 360 companies in all 50 states and the District of Columbia that hold state licenses to act as wine and/or spirits wholesalers and/or brokers. WSWA's members distribute more than 80% of all wine and spirits sold at wholesale in the United States. WSWA has previously filed *amicus* briefs in other cases before this Court that involved issues concerning the wine and spirits industry, including *Granholm* v. *Heald*, 544 U.S. 460 (2005).

WSWA, as a trade association for wine and spirits distributors and/or brokers in every State and the District of Columbia, has a fundamental interest in issues concerning federal and state regulation of the shipment and delivery of products, such as alcohol, that potentially pose a danger to certain segments of the population. Accordingly, WSWA is concerned about the proper boundaries between federal and state regulation of such products. The issue presented in this case – whether the express preemption provisions in the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") preempt portions of Maine's statute regulating the shipment and delivery of tobacco products – is of vital concern to WSWA and its members because alcohol products raise related but legally separate and distinct regulatory issues for both state and federal officials.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3, *amicus curiae* states that petitioner and respondents have consented to the filing of this brief. *Amicus curiae* has filed letters with the Clerk of the Court reflecting the consent of the parties.

This brief does not propose to address the specific statutory construction issue presented by the State of Maine. WSWA does not have a view on that question, which will be briefed ably by others. Instead, this brief focuses on two points. First, strong and effective State regulation of the shipment and delivery of alcohol is critically important and unquestionably in the public interest. Second, state laws governing the shipment and delivery of alcohol are fundamentally different from state laws governing the shipment and delivery of tobacco and other products that pose potential health risks because of the States' plenary authority under the Twenty-first Amendment to regulate the distribution and transportation of alcohol. See U.S. Const. amend. XXI, § 2. Accordingly, however the Court decides the federal preemption issue presented in this case, it should recognize and make clear in its decision that it is not deciding any issue concerning federal preemption of state laws governing the shipment and delivery of alcohol, either under the FAAAA or any other federal law. Those issues are not presented here and the Court should await an appropriate case in which to decide them.

SUMMARY OF ARGUMENT

The States have a strong and legitimate interest in enacting and enforcing laws that restrict underage access to alcohol. Despite the existence of minimum drinking age statutes in all 50 states, studies indicate that 70 percent or more of high school seniors have had alcoholic drinks, and underage drinking continues to be a prevalent problem. The consequences of underage drinking are devastating: there is a strong correlation between underage drinking and drunk driving deaths and serious injuries, other accidental injuries, violence, vandalism, suicide, poor school performance, risky sexual behavior, and adult alcoholism. It is the States that have primary responsibility for combating underage drinking, as reflected in the Twenty-first Amendment, congressional enactments, and prior decisions of this Court.

In deciding this case, the Court should not decide any issue concerning federal preemption of state laws governing the shipment and delivery of alcohol, either under the FAAAA or any other federal law. Alcohol is fundamentally different from other commodities because the Twenty-first Amendment grants the States plenary authority to regulate its distribution and transportation. Accordingly, the Court has held that the Twenty-first Amendment necessarily constrains Congress' power to enact laws that regulate the distribution and transportation of alcohol. In cases addressing whether federal laws preempt state laws governing alcohol, the Court has held that courts must specifically consider and analyze the State's interests under the Twenty-first Amendment that are served by the particular law at issue. Because state laws that govern the distribution of alcohol products raise unique and fact-specific Twenty-first Amendment issues, and no such law is at issue here, the Court should make clear in its decision that such state laws are not encompassed by its ruling.

ARGUMENT

I. THE STATES HAVE A STRONG INTEREST IN REGULATING THE DIRECT SHIPMENT AND DELIVERY OF ALCOHOL.

The illegal use of alcohol by young people is a serious problem in the United States. "More young people drink alcohol than smoke tobacco or use marijuana." Nat'l Acad. of Scis., *Reducing Underage Drinking: A Collective Responsibility* 35 (R. Bonnie & M. O'Connell eds., 2004) (the "NAS Report"); see also Teenage Research Unlimited, *Research Findings: Underage Alcohol Access & Consumption* 16 (2006), *available at* http://www.pointclickdrink.com/news/TRUSurvey.pdf (the "TRU Report").

According to a report released in 2004 by the National Academy of Sciences' Institute of Medicine:

> Alcohol use by young people is dangerous, not only because of the risks associated with acute impairment, but also because of the threat to their long-term development and well-being. Traffic crashes are perhaps the most visible of these dangers, with alcohol being implicated in nearly one-third of youth traffic fatalities. Underage alcohol use is also associated with violence, suicide, educational failure, and other problem behaviors. All of these problems are magnified by early onset of teen drinking: the younger the drinker, the worse the problem. Moreover, frequent heavy drinking by young adolescents can lead to mild brain damage. The social cost of underage drinking has been estimated at $53 billion [annually] including $19 billion from traffic crashes and $29 billion from violent crime.

NAS Report, at 1. "[D]rinking drivers under age 21 are involved in fatal crashes at twice the rate of adult drivers," and underage drinking is also "strongly correlated with violence, risky sexual behavior, poor school performance, suicide, and other harmful behaviors." *Id.* at 59; see also, *e.g.*, *id.* at 13 ("Alcohol use by children, adolescents, and young adults under the legal drinking age of 21 produces human tragedies with alarming regularity."). "[O]n college campuses 95 percent of all violent crime and 90 percent of college rapes involve the use of alcohol by the assailant, victim, or both." *Id.* at 61.

Despite minimum drinking age laws in all 50 States, young people under age 21 continue to find ways to gain access to alcohol. Approximately 80 percent of high school seniors report that they have had at least one alcoholic drink in their lives, and more than 70 percent have had a drink in the past year. *Id.* at 14, 35, 44-45; see also TRU Report, at 16 (74 percent of those aged 18-20 report having had "more than a sip" of alcohol). Almost all high school seniors (94.7 percent in one survey cited in the NAS Report) state that it is "'fairly'" or "'very'" easy to get alcohol. NAS Report, at 20.

Young people obtain alcohol in a variety of different ways. *Id.* at 158-84. One significant and growing method is through the Internet or other methods of home delivery. *Id.* at 174. As many as 10 percent of young people currently report obtaining alcohol in this manner. *Id.*; see also TRU Report, at 14 (twelve percent of those surveyed report knowing a friend who has purchased alcohol online). It is simply inconceivable that this percentage will not grow significantly as more teens discover the potential ease with which alcohol can be obtained by use of the Internet.

The link between underage drinking and access to the Internet is highlighted in a 2005 report from the National Clearinghouse on Alcohol and Drug Information (NCADI), part of the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration. The NCADI report warned that "[m]ore than 30 million children in the United States under 18 currently use the Internet" and "80 percent of 12th grade students routinely go online," where the Internet offers minors easy access to alcohol. *Internet Offers Minors Easy Access to Alcohol and Illicit Drugs* (July 20, 2005), http://ncadi.samhsa.gov/newsroom/rep/2005/239.aspx. The NCADI report explained:

> The Internet connects teenagers to their friends and the world outside their homes. What parents may not realize is that their kids could be connecting to alcohol and illicit drugs as well.
>
> An increasing number of teens have credit or debit cards, providing an easy and anonymous way to order alcohol or drugs off the Web. The Internet acts as a general store where computer users can get hold of almost anything such as:
>
> • Beer, wine, and hard liquor – including tequila and vodka – without verification of age.
>
> ....

> Underage college students can order alcohol off the Internet and have it delivered right to their dorm door – with no questions asked. Teenagers don't need a fake ID to purchase alcohol on the Internet and they don't face the danger of getting caught at a store with a fake ID.

Id.

Both practically and legally, it is the States that have the primary responsibility to combat underage drinking. Indeed, State law enforcement officials have become more aware of this problem in recent years, and have been working to develop tools to fight the ability of underage persons to obtain alcohol through the Internet, phone orders, and other methods of direct delivery, for several years. See, *e.g.*, *Delivery May Have Broken Law*, Daily Iowan, Mar. 19, 2007, *available at* http://media.www.dailyiowan.com/media/storage/paper599/news/2007/03/19/Metro/Delivery.May.Have.Broken.Law-2779624.shtml (describing delivery of alcohol to college students without any attempt to verify age of recipient); Internet Retailer, Massachusetts Charges Four Online Alcohol Merchants With Selling to Minors (June 15, 2004), http://www.internetretailer.com/internet/marketing-conference/57375-massachusetts-charges-four-online-alcohol-merchants-selling-minors.html (describing sting operation by Massachusetts Attorney General's office in which UPS and other carriers, along with a number of different retailers and producers of alcohol, were cited for illegal sales to minors); Fed. Trade Comm'n, Workshop (Oct. 8, 2002) (Remarks of Michigan Assistant Attorney General Irene M. Mead), http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/mead.htm (describing sting operations and other enforcement efforts by Michigan Attorney General's office dating back to 1999 that intercepted alcohol shipments to minors through UPS from various retailers and producers).

The primacy of the States in combating the abuse of alcohol generally, and underage access to alcohol specifically is rooted in Section 2 of the Twenty-first Amendment, discussed

in more detail below. The fundamental role of the States has also been recognized by Congress, by other observers, and by this Court.

In 2006, Congress enacted the Sober Truth on Preventing Underage Drinking Act (the "STOP" Act), Pub. L. No. 109-422, 120 Stat. 2890 (2006), and expressed its view that the States should bear significant and primary responsibility for combating youth access to alcohol. In its "Sense of Congress" statement in that Act, Congress declared:

> Alcohol is a unique product and should be regulated differently than other products by the States and Federal Government. States have primary authority to regulate alcohol distribution and sale, and the Federal Government should support and supplement these State efforts. *States also have a responsibility to fight youth access to alcohol and reduce underage drinking.* Continued State regulation and licensing of the manufacture, importation, sale, distribution, transportation and storage of alcoholic beverages are clearly in the public interest and are critical to promoting responsible consumption [and] preventing illegal access to alcohol by persons under 21 years of age ....

See 42 U.S.C. § 290bb-25b(b)(7) (emphasis added). Moreover, in a list of potential performance measures for state regulatory schemes, Congress specifically identified the issue of "[w]hether or not the State has policies and regulations with regard to direct sales to consumers *and home delivery of alcoholic beverages*." *Id.* § 290bb-25b(c)(2)(B)(ii)(V) (emphasis added).

The NAS Report from 2004 reflects a similar view. In connection with its detailed study of the issue, the NAS offered a set of comprehensive proposals to reduce underage drinking, recommending that states regulate Internet sales and home delivery "to reduce the likelihood of sales to underage purchasers." NAS Report, at 174 (emphasis omitted).

Specifically, the NAS recommended that the States enact laws that "require all packages for delivery containing alcohol to be clearly labeled as such" and "require persons who deliver alcohol to record the recipient's age identification information from a valid government-issued document (such as a driver's license or ID card)." *Id.* at 174-75 (emphasis omitted).

And, indeed, this Court itself has recognized the critically important role of the States in restricting the access of underage persons to alcohol. In *Granholm* v. *Heald*, 544 U.S. 460, 489 (2005), the Court expressly acknowledged that the States have a legitimate interest in enforcing their laws against underage drinking. See also *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion) (recognizing that the State's regulation of alcohol distribution was supported by its "unquestionably legitimate" interests in "promoting temperance, ensuring orderly market conditions, and raising revenue"). Although the Court invalidated the particular regulation of direct sales at issue in *Granholm* because it discriminated against out-of-state producers, the Court noted the availability of less restrictive, non-discriminatory alternatives:

> For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package [containing alcohol].

544 U.S. at 491. Many states have enacted laws, similar to the Model Direct Shipping Bill, that require labeling on packages containing alcohol, the signature of an adult over the age of 21 upon delivery, or both.[2]

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[2] *E.g.*, Ariz. Rev. Stat. § 4-203.04(J)(3); Cal. Bus. & Prof. Code §§ 23661.2, 23661.3(b)(2)-(3); Colo. Rev. Stat. § 12-47-104(3); Conn. Gen. Stat. § 30-19f(c); Del. Code Ann. tit. 4, § 526(a)(6)-(7); Haw. Rev. Stat. § 281-33.6(b)(1)-(2); Idaho Code Ann. § 23-1309A(8)-(9); 235 Ill. Comp. Stat. 5/6-29(b); Ind. Code § 7.1-3-26-9(2)(B) & (D); Mich. Comp.

In sum, state regulation of the delivery of alcoholic beverages has a unique status under the Constitution, federal statutory law, and this Court's decisions. Accordingly, whatever rules might apply to the relationship between federal and state law regulating other products which may be subject to abuse by minors do not necessarily apply of their own force to the distribution of alcohol.

II. THE COURT SHOULD NOT DECIDE IN THIS CASE ANY ISSUE CONCERNING FEDERAL PREEMPTION OF STATE LAWS GOVERNING THE SHIPMENT AND DELIVERY OF ALCOHOL.

Throughout their briefs at the petition stage, the parties and their *amici* suggest that the preemption issue in this case extends beyond Maine's law regulating the shipment and delivery of tobacco and encompasses laws regulating the shipment and delivery of numerous other potentially dangerous products and substances, and they specifically identify alcohol. See, *e.g.*, Pet. 16 ("The decision [below], thus, preempts countless state laws that have existed for decades, regulating the sale and delivery of substances, from tobacco to weapons to alcohol."); *id.* at 24 (asserting that the effect of the decision below "is to eliminate any state ability to control how retailers deliver tobacco, alcohol and other substances"); Brief *Amicus Curiae* Of The State of California And 35 Other States In Support Of The Petition ("States' Br.") at 2 (asserting that the decision below "not only threatens other states' tobacco laws, but also threatens state

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Laws § 436.1203(3)(f); Minn. Stat. § 340A.417(b); Mo. Rev. Stat. § 311.462(2); N.H. Rev. Stat. Ann. § 178:27(II); N.Y. Alco. Bev. Cont. Law § 79-c(3)(b) & (e)(i); N.C. Gen. Stat. § 18B-1001.1(c); 2007 Or. Laws ch. 854 (to be codified at Or. Rev. Stat. § 471.229(4) & (5)(b) (eff. Jan. 1, 2008)); S.C. Code Ann. § 61-4-747(C)(2); Tex. Alco. Bev. Code Ann. § 16.09(b)(1) & (d); Vt. Stat. Ann. tit. 7, § 66(d)(3)(B) & (e)(1); Va. Code Ann. § 4.1-209.1(C); W. Va. Code § 60-8-6(b); Wyo. Stat. Ann. § 12-2-204(d)(iii) & (iv).

restrictions on the delivery of other dangerous products that have been traditionally regulated under states' police powers, including . . . liquor"). Moreover, the questions presented are whether the FAAAA preempts state police powers to regulate "carriers that deliver contraband *such as* tobacco *and other* dangerous substances" and whether it preempts specific state requirements imposed on "shippers of contraband *such as* tobacco *and other* dangerous substances." Pet. i (Questions Presented Nos. 1 and 2) (emphases added).

To be sure, the Court's decision in this case interpreting the preemptive scope of the FAAAA will have implications for other state laws beyond the particular Maine tobacco law at issue. Nevertheless, it is important for the Court to recognize that state laws that govern alcohol distribution stand in a unique position and present unique legal issues because the Twenty-first Amendment grants the States plenary authority to regulate the distribution and transportation of alcohol within their borders. Because alcohol is singled out in the Constitution – alone among commodities – as a product over which States have unparalleled authority, this Court has held that ordinary principles of federalism do not apply in cases addressing the appropriate federal-state balance in the area of alcohol regulation. Thus, whatever standards of preemption arise under the FAAAA that apply to the transportation of other products do not necessarily control when the product is alcohol. Therefore, the Court should make clear in its decision that it is not addressing or resolving any issues concerning federal preemption of state laws that govern the shipment and delivery of alcohol.

Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The Court has held that the Twenty-first Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The Court recently reaffirmed its adherence to this language in *Granholm*, 544 U.S. at 488, and further held that "[t]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Id.* at 484; see also *id.* at 494 ("our Constitution has placed commerce in alcoholic beverages in a special category") (Stevens, J., dissenting). As this Court has recognized, state alcohol distribution systems adopted pursuant to the Twenty-first Amendment serve vital state interests in "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432. Accordingly, "[g]iven the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *Id.* at 433. Thus, the ordinary respect accorded to state regulation is given special weight when the subject at issue is alcohol transportation and distribution.

It is therefore not surprising that the Court has held that § 2 of the Twenty-first Amendment necessarily constrains Congress' power to regulate the distribution and transportation of alcohol in ways that might interfere with comprehensive state schemes. Specifically, the Court has held that although "§ 2 does not abrogate Congress' Commerce Clause powers with regard to liquor," *Granholm*, 544 U.S. at 487, Congress' interstate commerce power "is directly qualified by § 2." *Midcal*, 445 U.S. at 108; see also *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 346 (1987) ("§ 2 directly qualifies the federal commerce power").

As a result, resolution of questions concerning the proper boundaries and balance between federal and state regulation

of alcohol requires consideration of both the Commerce Clause and the Twenty-first Amendment, in light of the facts and regulations at issue in the particular case:

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, *and in the context of the issues and interests at stake in any concrete case.*

Hostetter v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) (emphasis added). Ultimately, the Court resolves issues concerning the proper federal-state balance in the area of alcohol regulation by engaging in a "pragmatic effort to harmonize state and federal powers." *Midcal*, 445 U.S. at 109; see also *id.* at 110 ("The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'") (quoting *Hostetter*, 377 U.S. at 332).

In the specific context of federal preemption, the Court has held that the necessary "harmonization" of federal power under the Commerce Clause and state power under the Twenty-first Amendment requires express consideration and analysis of the State's interests under the Twenty-first Amendment. In *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), the Court addressed whether provisions of federal communications law preempted Oklahoma's requirement that Oklahoma cable television operators delete advertisements for alcoholic beverages contained in the out-of-state signals that they retransmitted to their subscribers. The Court engaged in a two-step analysis to resolve the preemption issue. First, it "consider[ed] whether the Oklahoma statute does in fact conflict with federal law." *Id.* at 698. After concluding that a conflict existed, it then "assess[ed] the impact of the Twenty-first Amendment." *Id.* (noting that the Court employed a similar two-step analysis in *Midcal*, where it concluded that a California wine-pricing program violated the Sherman Act and then addressed whether the Twenty-first Amendment

nevertheless barred application of the Sherman Act in the particular case); see also *id.* at 712 (the Court must "consider whether § 2 permits Oklahoma to override the federal policy").

In conducting the second step of the analysis in *Crisp* – the Twenty-first Amendment analysis – the Court said that the "central question" is

> whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.

Id. at 714 (citing *Midcal* and *Hostetter* for the proposition that this "central question" must be resolved "within the context of the issues and interests at stake in each case"). It noted that the force of the Twenty-first Amendment is greatest when the state regulation at issue "directly implicate[s]" the State's "*central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold.*" *Id.* at 716 (emphasis added). After examining the purposes, operation and effects of the state law in *Crisp*, the Court concluded that Oklahoma's advertising provision "only indirectly" implicated that central power and, therefore, held that enforcement of the provision was barred by the Supremacy Clause. *Id.* at 715; see also *324 Liquor Corp.*, 479 U.S. at 346-52 (concluding that the Twenty-first Amendment did not bar application of the Sherman Act to New York's statutory scheme governing liquor prices, where the State failed to establish that the scheme furthered its stated interests in stabilizing the retail market by protecting small retailers or in promoting temperance).

The foregoing precedent establishes that federal preemption questions involving state laws that regulate the distribution and transportation of alcohol present unique and complex

Twenty-first Amendment issues that require unique and fact-intensive analysis. Specifically, even if a court determines that there is a conflict between the federal and state laws, it must then go further and examine the state interests that are "implicated by [the] state regulation" and determine whether those interests "are so closely related to the powers reserved by the Twenty-first Amendment" that they must prevail over the countervailing federal interests. *Crisp*, 467 U.S. at 714. Accordingly, however the Court decides the FAAAA preemption issue in this case with respect to Maine's tobacco law, and however that ruling might apply to other state laws that address the shipment and delivery of other products which may be subject to abuse by minors, the Court should be mindful that laws that address alcohol products stand apart from these other laws and require a separate Twenty-first Amendment analysis. This concern is paramount in a case, such as this one, that involves the transportation of products into the hands of consumers, an area where the States' powers under the Twenty-first Amendment are at their zenith. Therefore, the Court should not address in this case any issue concerning federal preemption of state laws governing the shipment and delivery of alcohol products and should make clear in its decision that such state laws are not encompassed by its ruling.

CONCLUSION

The Court should not decide in this case any issue concerning federal preemption of state laws governing the shipment and delivery of alcohol.

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